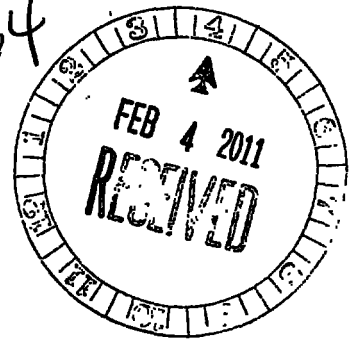


ORIGINAL

Before the
SURFACE TRANSPORTATION BOARD

228764



Finance Docket No. 35412

MIDDLETOWN & NEW JERSEY RAILROAD, LLC--LEASE AND
OPERATION EXEMPTION--NORFOLK SOUTHERN RAILWAY COMPANY

SUPPLEMENTAL EVIDENCE AND ARGUMENT

ENTERED
Office of Proceedings

FEB 4 - 2011

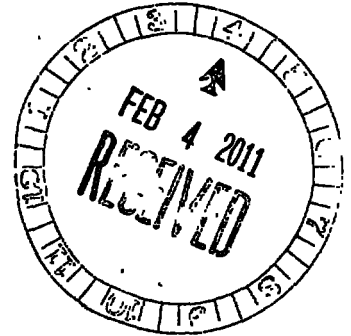
Part of
Public Record

GORDON P. MacDOUGALL
1025 Connecticut Ave.
Washington DC 20036

Attorney for Samuel J. Nasca

February 4, 2011

Before the
SURFACE TRANSPORTATION BOARD



Finance Docket No. 35412

MIDDLETOWN & NEW JERSEY RAILROAD, LLC--LEASE AND
OPERATION EXEMPTION--NORFOLK SOUTHERN RAILWAY COMPANY

SUPPLEMENTAL EVIDENCE AND ARGUMENT

Preliminary Statement

Petitioner, Samuel J. Nasca,^{1/} for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits this Supplemental Evidence and Argument, in accordance with the Surface Transportation Board (STB) decision, dated and served December 23, 2010, instituting a proceeding to consider evidence and argument addressing whether to revoke the notice of exemption in this proceeding.

Middletown & New Jersey Railroad, LLC (M&NJ), on August 31, 2010, filed a notice of exemption (Notice), pursuant to the carrier class exemption, 49 CFR §1150.41, to carry out a lease transaction otherwise governed by provisions of 49 U.S.C. 10902.^{2/}

^{1/} New York State Legislative Director for United Transportation Union, with offices at 35 Fuller Road, Albany NY 12205.

^{2/} Leases between rail carriers are ordinarily governed by 49 U.S.C. 11323(a)(2). However, the STB ruled that leases also come under §10902. Chicago Rail Link, LLC-Lease & Oper.-Union Pacific RR Co., 2 S.T.B. 534, 535-36 (1997), rev. den. United Transp. Union-Illinois v. Surface Transp., 169 F.3d 474, 480 (7th Cir. 1999).

M&NJ's description of the transaction, filed with its August 31, 2010 Notice, differs from that published by the STB on September 16, 2010, 75 Fed. Reg. 56653.^{3/} In particular, the STB's Notice added the December 31, 2020 expiration date, along with the M&NJ disclosure that the Lease Agreement contains a provision that would provide for a "Lease Credit" whereby M&NJ may reduce its annual lease payments by receiving a credit for each car interchanged with NSR. The STB added that M&NJ notes that Norfolk Southern Railway (NSR) initially proposed fixed rental payment with no option to reduce the rent, but M&NJ insisted on a lease credit option to provide an opportunity for M&NJ to earn a lower rental payment so it would be able to invest in improvements on the lease lines to increase traffic levels. The STB said that according to M&NJ, the affected interchange point is Campbell Hall, NY. The STB's notice concluded that M&NJ certified annual revenues will not result in it becoming a Class II or I rail carrier, and projected annual revenue would not exceed \$5 million, with consummation expected on or shortly after October 1, 2010.^{4/}

UTU-NY on September 10, 2010, moved for access to the agreements mentioned by M&NJ in its Notice, but which had not been public or filed with the STB. M&NJ filed the agreements with the STB on September 16, 2010, and on September 15, 2010, agreed to

^{3/} The Notice was not published by the Director, Office of Proceedings; instead, the STB revoked the delegation to the Director, and itself issued the Notice, by decision served September 16, 2010.

^{4/} Vice STB Chairman Mulvey, dissented. He suggested additional explanatory information should be required, by means of an application or a petition for exemption.

access for the public, subject to a protective order. The STB on September 16, 2010, issued a decision granting access to the confidential documents, subject to M&NJ's request for a protective order.

UTU-NY on September 23, 2010, petitioned STB to stay operation of the Notice, pending disposition of UTU-NY's forthcoming Petition to Reject the Notice or to Revoke the Exemption. UTU-NY's Stay petition mentioned that its forthcoming Petition to Revoke or Reject would be filed in a few days on September 27, 2010, and that UTU-NY's Petition for Stay, should be deemed supplemented by the formal UTU-NY Petition. (UTU-NY Petition, 9/23/10, 1-2). M&NJ on September 28, 2010, filed its opposition to UTU-NY's Petition for Stay. M&NJ asked the STB not to consider the full UTU-NY Petition to Revoke or Reject, which had been filed September 27, 2010, in deciding whether to stay the effective date of the Notice.

The STB on September 29, 2010, issued a stay of the effective date for the Notice, in order to provide the STB sufficient time to fully consider the issues presented by the petition for stay. The STB in its September 29, 2010 decision, in a footnote, acknowledged that UTU-NY had filed its petition to revoke the exemption on September 27, 2010. (Decision, 9/29/10, 1n.2).

The STB on October 6, 2010, denied the UTU-NY stay request. The STB reasoned that UTU-NY had not met the stay criteria. The STB's decision gave primary attention to "Likelihood of Prevailing on the Merits." (Decision, 10/6/10, 2-4). The STB's October 6, 2010 denial of a stay made no mention of the UTU-NY petition to

revoke and, as in the STB's earlier stay decision of September 29, 2010, only took notice of the latter UTU-NY petition by a single reference in a footnote. (Decision, 10/6/10, 1n.2). Vice Chairman Mulvey, who had dissented from the STB's September 16, 2010 acceptance of the M&NJ's Notice,^{5/} commented that UTU-NY has submitted insufficient evidence and argument to satisfy the STB's stay criteria. The Vice Chairman made no mention of the full UTU-NY Petition to Revoke or Reject, filed September 27, 2010.

M&NJ on October 15, 2010, filed a 7-page Reply to the UTU-NY's September 27, 2010 Petition to Revoke or Reject.

The STB on December 23, 2010, by its Director, Office of Proceedings, instituted a proceeding to consider evidence and argument addressing whether to revoke the notice of exemption in this proceeding, with any interested party to submit comments and evidence by February 4, 2011, and responses to opening submissions on February 22, 2011; and M&NJ by January 6, 2011, to serve a copy of the STB's December 23, 2010 decision on all of the shippers on the lines for whom M&NJ has provided rail service since commencing operations.

In a footnote to its December 23, 2010 decision, the STB ruled that because the notice of exemption is already in effect, UTU-NY's pleading will be treated as a petition to revoke. (Decision, 12/23/10, 2n.1).

^{5/}As indicated, the Vice-Chairman would have preferred that M&NJ file an application or petition for exemption, supra 3n.4.

M&NJ'S NOTICE SHOULD BE
REJECTED OR THE EXEMPTION REVOKED

The M&NJ's Notice should be rejected, or the exemption should be revoked.^{6/} Petitioner understands that M&NJ filed a proof of service upon shippers, but without the traditional identification of such entities. Petitioner expects that M&NJ will substantiate its service certification more meaningfully in its Response.

1. September 27, 2010 UTU-NY Petition. This instant pleading is a supplement to the UTU-NY Petition to Revoke or Reject, filed September 27, 2010. Petitioner does not abandon the argument, verified statement, and exhibits filed, with the September 27, 2010 pleading, but incorporates the entire pleading herein.

2. Rejection of the M&NJ Notice. The M&NJ's Notice, filed August 31, 2010 should be rejected. The DOP's ruling of December 23, 2010, inferring that the matter of rejection is no longer an issue inasmuch as the exemption is in effect (Decision, 12/23/10, 2n.1) is erroneous and contrary to the STB's decision of September 16, wherein the STB in revoking the delegation to the DOP, stated the Notice can be ruled void ab initio if it contains false or misleading information.^{7/}

6/ UTU-NY fails to appreciate the STB (DOP) ruling that the September 27, 2010 UTU-NY pleading is limited to revocation, on the ground the notice is already in effect. (Decision, 12/23/10), 2n.1). The effectiveness of a notice has no bearing upon whether it contains false or misleading information, or other grounds for rejection, ab initio.

7/ False and misleading information are not the only possible grounds for rejection.

Rejection is appropriate here. M&NJ has failed to establish it was a rail carrier on August 31, 2010 when it filed its Notice. To be sure, M&NJ in its Reply, filed October 15, 2010, in opposition to the UTU-NY's September 27, 2010 Petition to Revoke/Reject, stated that it acquired the M&NJ line between Middletown and Slate Hill, pursuant to F.D. No. 35227 (served March 20, 2009). (M&NJ Reply, 10/15/10, 4). ^{8/} However, the M&NJ's October 15, 2010 Reply did not indicate it ever exercised the operating authority of its Notice.

The Supplemental Verified Statement of Samuel J. Nasca indicates M&NJ never performed rail freight operations between April 5, 2009 and August 31, 2010. The lack of operations is indicated by the failure of M&NJ to issue OPSL or OSG information after it acquired the Middletown-Slate Hill line in 2009. See: UTU-NY Petition to Revoke/Reject, 9/27/10, 4-5, 7, Appendix 2,3.

The carrier was named Middletown and New Jersey Railway Company, Inc. when it sought and received abandonment authority at AB-762 by STB on June 20, 2008. It exercised abandonment authority on December 5, 2008 as Middletown & New Jersey Railway Co., Inc. When the carrier sold the remaining Middletown-Slate Hill segment, the acquiring entity filed and received acquisition and operation authority in F.D. No. 35227 as Middletown and New Jersey Railroad, LLC. Currently, in F.D. No. 35412, the noticing entity is Middletown & New Jersey Railroad, LLC.

M&NJ's Reply indicates its OPSL will no longer contain references to the Company, and its stations will be properly

^{8/} The Notice of Exemption in F.D. No. 35227 became effective April 5, 2009.

referenced. (M&NJ Reply, 10/15/10, 4). Attached hereto as Appendix 1 is FT MNJ 9001, issued September 21, 2010.

It is clear that MNJ was not a rail carrier prior to August 31, 2010, and thus was incapable of filing a rail carrier notice under the §10902 acquisition and operation class exemption. A rail carrier is defined as providing common carrier railroad transportation for compensation. 49 U.S.C. 10102(5); and an entity must be a Class II or Class III rail carrier providing transportation subject to the STB's jurisdiction in order to invoke §10902, or its class exemption. 49 CFR 1150.41.

The STB should reject the M&NJ notice as providing false or misleading information, and the notice naming a transaction not subject to the STB's authority under 49 U.S.C. 10902 or its class exemption regulations.^{2/}

3. Revocation of Exemption. If the Notice is not rejected, the exemption should be revoked. UTU-NY will not repeat the grounds for revocation, set forth in the September 27, 2010 Petition, at 6-8, along with the Verified Statement of Samuel J. Nasca, as Supplemented herein. The prior submission is part of the current Supplemental Evidence and Argument, and vice versa.

To the extent the foregoing argument and evidence for rejection are found insufficient for the rejection remedy, it is hereby

^{2/} We note the STB's December 23, 2010 decision requiring M&NJ to furnish the STB's decision upon all shippers for whom M&NJ has provided rail service since commencing operations (Decision, 12/23/10, 2n.1), failed to define the term "commencing operations," so as to make it clear that pre-and-post August 31, 2010 were intended.


incorporated for that part of the petition which seeks revocation of the exemption.

Revocation of the exemption is necessary to carry out the rail transportation policy, the relevant criteria of which are set forth in UTU-NY's Petition to Revoke or Reject.

CONCLUSION

The STB should reject the Notice of Exemption, filed August 31, 2010; if the Notice is not rejected, the exemption should be revoked.

Respectfully submitted,


GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

February 4, 2011

Attorney for Samuel J. Nasca

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall

FT MNJ.9001

MIDDLETOWN & NEW JERSEY RAILROAD LLC

FREIGHT TARIFF MNJ 9001

ADOPTION NOTICE

The Middletown & New Jersey Railroad LLC (MNJ), hereby adopts, ratifies and makes its own, in every respect as if the same had been originally issued by it, all freight tariffs, classifications, rules, notices, concurrences, divisions, authorities, powers of attorney, or other instruments whatsoever, including supplements or amendments thereto, whether or not filed with the Surface Transportation Board or former Interstate Commerce Commission by the Norfolk Southern Railway Company (NS) prior to October 1, 2010, insofar as said instruments apply from, to, at or via stations of the Norfolk Southern Railway Company (NS) set forth in the attached Exhibit.

This tariff is also applicable on intrastate traffic, except where expressly provided to the contrary.

Issued under authority of STB Finance Docket No. 35412

ISSUED: September 21, 2010

EFFECTIVE: October 1, 2010

ISSUED BY:

**Alfred M Sauer
Vice President
Middletown & New Jersey Railroad LLC
505 South Broad Street
Kennett Square, PA 19348**

OPSL-6000 SERIES

MIDDLETOWN & NEW JERSEY RAILROAD LLC (MNJ - 475)

| STATION TYPE | STATION | COUNTY | RULE 260 | OPSL | FSAC | SPLC | RATE NRB | ZIP |
|-----------------|------------------------|--------|-------------|-------|-------|--------|----------------|-------|
| O | CAMPBELL HALL (1-3700) | NY | CMPHL | 20000 | 20000 | 176561 | | 10916 |
| O, R | MAYBROOK (1-3700) | NY | ORANGE | 30000 | 30000 | 176616 | MIDDLETOWN, NY | 12543 |
| O, R | MONTGOMERY (1-3700) | NY | ORANGE | 30050 | 30050 | 176614 | MIDDLETOWN, NY | 12549 |
| O, R | WALDEN (1-3700) | NY | ORANGE | 40000 | 40000 | 176619 | MIDDLETOWN, NY | 12586 |
| O, R | GREYCOURT (1-3700) | NY | ORANGE | 50000 | 50000 | 176575 | MIDDLETOWN, NY | 10918 |
| O, R | CHESTER (1-3700) | NY | ORANGE | 50010 | 50010 | 176572 | MIDDLETOWN, NY | 10918 |
| O, R | WARWICK (1-3700) | NY | ORANGE | 50050 | 50050 | 176686 | MIDDLETOWN, NY | 10990 |

O - Operating R - Revenue

EXPLANATION OF NOTES:

1 - Notes 1 and 3700 - As explained in OPSL 6000-series

2 - Note 3700 - Change:

Middletown & New Jersey Railroad LLC
505 South Broad St
Kennett Square, PA 19348
Phone (610) 925-0131
Fax (610) 925-0135

(Underscored portion denotes change)

3 - Interchange: Campbell Hall, NY - "Operating" interchange between the MNJ and NS.

SUPPLEMENTAL
VERIFIED STATEMENT
OF SAMUEL J. NASCA

My name is Samuel J. Nasca, with offices at 35 Fuller Road, Albany, NY 12205. I serve as New York State Legislative Director for United Transportation Union (UTU-NY), a full-time elective position I have held since March 1984. My seniority commenced in 1967 with the former Erie-Lackawanna Railroad Company.

I previously filed a verified statement in this proceeding, dated September 23, 2010, utilized in connection with my Petition for Stay, filed that day, and also attached to my Petition to Revoke or Reject, filed September 27, 2010. My verified statement, as Exhibit A thereto, reproduces the color-coded sketch map filed by M&NJ as part of its Notice of Exemption, filed August 31, 2010.

I have reviewed my September 23, 2010 statement, and believe it to be accurate. Subsequent thereto, and also following the STB's December 23, 2010 decision instituting an investigation, I have made an investigation of certain facts, with assistance from operating personnel represented by United Transportation Union (UTU) in the involved New York and New Jersey areas.

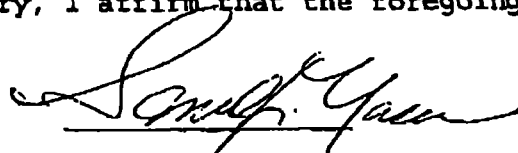
1. Although M&NJ is said to have acquired the rail line of the Middletown & New Jersey Railway, Co., Inc. sometime after April 5, 2009, I understand the line between Slate Hill and Unionville had been abandoned no later than December 5, 2008, in accordance with my Exhibit B, consisting of two pages, on file with the STB.

2. My investigation by consultation with UTU operating personnel indicates there has been no rail freight transportation performed by M&NJ on M&NJ trackage, since April 5, 2009, when I understand M&NJ acquired the trackage between Slate Hill and Middletown pursuant to its Notice in F.D. No. 35227, and August 31, 2010, when I understand M&NJ filed its notice in this proceeding; and likewise no interchange between M&NJ and Norfolk Southern Railway Company (NSR) at Middletown during this approximate 17-months period.

3. In viewing the sketch map attached as Exhibit A to my September 23, 2010 verified statement, I see no trackage rights for M&NJ over the NSR line to connect Middletown with Campbell Hall.

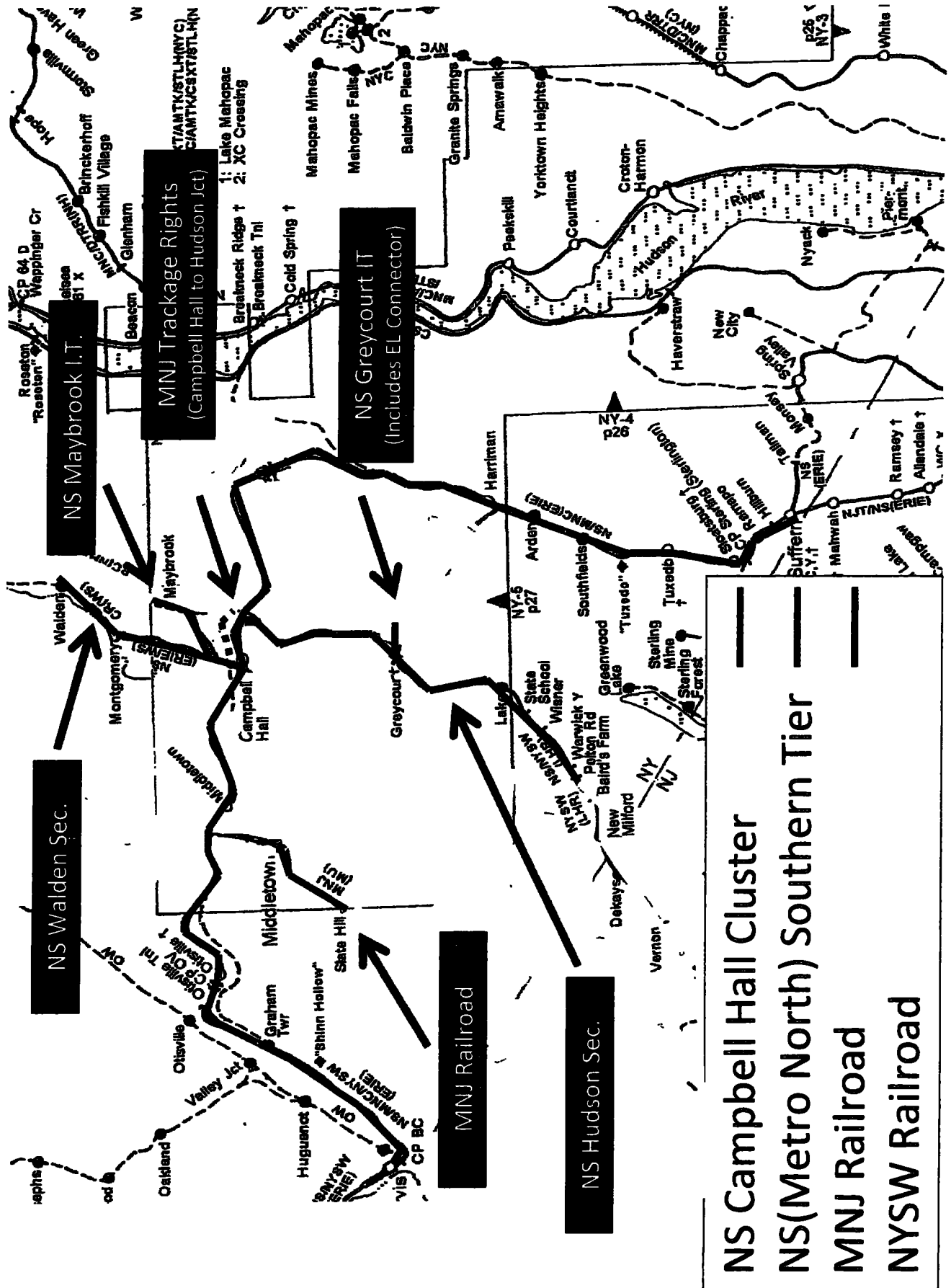
4. The rail carrier job loss projected in my September 23, 2010 verified statement unfortunately has been largely realized. This has aggravated a reduction in employment occasioned by the economic recession.

Under the penalties of perjury, I affirm that the foregoing is true and correct as stated.

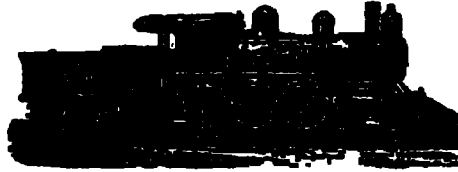


SAMUEL J. NASCA

Dated at
Albany NY
February 4, 2011



224125



Middletown & New Jersey Railway Co., Inc.
140 East Main Street, Middletown, New York 10940
Tel: (845) 343-3435 Fax: (845) 344-1547

December 1, 2008

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 I Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings
DEC 05 2008

Re: SIB Docket No. AB-762 X
Middletown and New Jersey Railway
Abandonment Exemption - in Orange County, NY
Notice of Consummation

Part of
Public Record

Dear Secretary Quinlan:

By notice of exemption served June 19, 2008, The Middletown and New Jersey Railway, Inc. ("M&NJ") was authorized to abandon a 7.5-mile line of railroad between milepost 6.5 in Slate Hill and milepost 14.0 in the Village of Unionville, located in Orange County, NY.

The exemption was to become effective on June 19, 2008. One condition was imposed in the Board's decision requiring that the M&NJ provide the National Geodetic Survey 90 days' notice prior to beginning salvage activities. Said notice was provided to the NGS.

M&NJ is hereby providing notice pursuant to 49 CFR § 1152.50(c) and § 1152.29(e)(2) that it has exercised the abandonment authority granted in this proceeding, and consummated abandonment of the subject line as of the date of this letter. M&NJ has discontinued operations 37 years ago, thus, there are no existing tariffs. M&NJ intends that the property be removed from the interstate rail network.

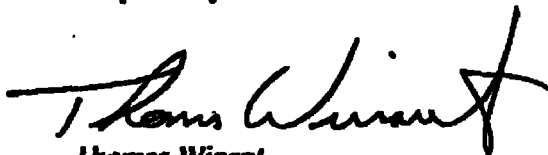
Hon. Anne K. Quinlan

Page 2

December 1, 2008

Pursuant to 49 CFR § 1152.29(c)(2), the M&NJ certifies that a copy of this Notice of Consummation has been sent to the New York Department of Public Service and the New York Department of Transportation.

Respectfully,



Thomas Winant

General Manager, Middletown and New Jersey Railway.

Cc:

New York Department of Public Service
3 Empire State Plaza
Albany, New York 12223-1350

Director of Real Estate
New York Department of Transportation
50 Wolf Road
Albany, NY 12232
Attn: Phil Healey

Director, Rail Bureau
New York Department of Transportation
50 Wolf Road
Albany, NY 12232
Attn: Ray Hessinger